United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-6122

To be argued by
RICHARD P. CARO

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P/S

United States Court of Appeals
FOR THE SECOND CIRCUIT
Docket No. 75-6122

NATIONAL ORNAMENT & ELECTRIC LIGHT CHRISTMAS ASSOCIATION, INC., LECO ELECTRIC COMPANY, INC., NOMA-WORLD WIDE, INC., RADIANT GLASS FIBERS COMPANY, INC., GILBERT MANUFACTURING COMPANY, INC., DEPENDABLE ELECTRIC MFG. CO., INC., ACLA, INC., BRONSON IMPORTS, LTD., GEM ELECTRIC MANUFACTURING COMPANY, INC., LIBERTY BELL CHRISTMAS, MINAMI INTERNATIONAL CORPORATION, NATHAN SCHECTER & SONS, THE THOMAS COMPANY, INC., and ZELL ELECTRIC MFG. COMPANY, INC.,

Appellees,

—against—

CONSUMER PRODUCT SAFETY COMMISSION, RICHARD O. SIMPSON, Chairman, LAWRENCE M. KUSHNER, BARBARA HACKMAN FRANKLIN, CONSTANCE E. NEWMAN, R. DAVID PITTLE, individually, and as members of the Commission,

Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

APPELLANTS' BRIEF

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

Of Counsel
JOSEPHINE KING,
RICHARD P. CARO,
Assistant United States Attorneys.

NORMAN BARNETT, ESQ.,
Consumer Product Safety Commission,
Of Counsel.

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2. Whether the Action Should Be Dismissed For Lack Of Standing And For Want of Reviewability

3. Whether the District Court Erred In Granting the Preliminary Injunction Where There Was No Finding That Irreparable Injury Was Clearly Shown To Exist

PRELIMINARY STATEMENT

This is an appeal from an order granting a preliminary injunction that was issued by the Honorable Jacob Mishler, C.J., United States District Court for the Eastern District of New York, on November 12, 1975, restraining the dissemination of a booklet describing five potential defects in Christmas tree lights, as long as it contained three descriptions of defects not apparent by visual observation alone and suggested methods for their detection without first promulgating consumer product safety standards.

STATEMENT OF THE CASE

On November 10, 1975, appellees, the National Ornament and Electric Christmas Light Ass'n, Inc., and thirteen of its member organizations (hereinafter collectively referred to as "NOEL"), initiated an action to enjoin the Consumer Product Safety Commission and its Commissioners ("Commission") from implementing its Consumer Deputy Retail Survey of Christmas Decorative Lights Program ("the Program"), whereby trained volunteers were to present retailers with a five page booklet describing five potential defects in decorative Christmas lights which could cause fires and electrical shocks and suggesting simple screening methods for detecting these defects.[1/] As a part of the

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1/ See booklet, "What Can You Do Now and How Should You do It - A Guide For Retailers For Evaluating the Comparative Safety Of Christmas Tree Lights." Joint Appendix on Appeal ("App.") at A-26 to A-31.

Program[2/] the retailers were to be asked to voluntarily check their tree lights for these defects. They were to be advised, however, that their cooperation was voluntary and not required by law and that they were not liable to any penalties if they did not participate in the Program.[3/]

NOEL, in their pleadings, contested the validity of the Program and the screening methods principally for procedural irregularities. They did not, however, challenge the

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2/ The Program was undertaken in conjunction with other Commission actions involving Christmas tree lights. The Commission had under consideration the possibility of undertaking an industry-wide rulemaking proceeding to establish prospective "consumer product safety standards" for the lights. Also, earlier this year the Commission notified some of the indivdual manufacturers and importers of defects identified with their specific products already on the market and requested that action be taken to correct or eliminate the defects. Some of the individual manufacturers and importers submitted corrective action plans to the Commission for its consideration. During the pendency of this appeal, the Commissioners met and considered the plans submitted and the possibility of undertaking an industry-wide rulemaking proceeding. The Commission took varied action on the plans submitted, accepting some for which it will monitor compliance and seeking voluntary corrective action without monitoring for others. It rejected the alternative of undertaking adjudicative action against the individual manufacturers; however, it approved the issuance of a notice of rulemaking to establish a prospective industry-wide "consumer product safety standard". The informational program consisting of the consumer deputy visits and the dissemination of a "fact sheet" and the booklet as restricted by the lower court order to apprise retailers and the public of potential defects in lights now being sold has been continued.

3/ See revised Directive and Introduction Letter. App. at A 32 to A 35.

substantive validity of the methods in relation to their intended purpose, and did not allege that their products contained the described defects. On the contrary, their claim of irreparable injury was primarily based upon the contention that retailers, out of fear of penalties under the Act, and without checking the lights,[4/] would return their entire stock of Christmas tree lights regardless of the existence or non-existence of the described defects.

A T.R.O. Hearing was held on November 10, 1975, and on November 12, 1975, the district court ordered that the Commission be preliminarily enjoined from distributing the booklet as long as it contained portions of three of the suggested detection methods, to wit those for detecting possible loose add-on connectors (No. 2), exposed bare wires (No. 3), and exposed socket contacts (No. 5). The lower court's reason for issuing the injunction was that insofar as the booklet had suggested detection methods that involved more than mere visual observations, the Commission had acted in excess of its statutory authority. Such detection methods, in the Court's view, constituted "product safety standards" under Section 7 of

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4/ Paragraph 29 of the Complaint. App. at A-51; see also affidavits in support of T.R.O. App. at A-57 to A-76. These affidavits are not part of the record below because the Order to Show Cause was not signed.

the Consumer Product Safety Act, (hereinafter referred to as the "Act) 15 U.S.C. §2056, which could only be put into effect in accordance with the procedural provisions of Sections 7 and 9 of the Act. 15 U.S.C. §§2056 and 2058.[5/] Notably, the lower court did not enjoin the use of all of the language contained in checks 2, 3 and 5 but only certain portions therein. Thus for methods 2 and 5, the first two sentences and for method 3, the first sentence were allowed to remain in the booklet for dissemination. Appellees' request for relief was denied in all other respects.

In issuing the preliminary injunction, the district court made no express finding of fact respecting the injuries NOEL alleged would result, nor did it find a balance of hardship in favor of NOEL. During the T.R.O. hearing, while argument was being heard off the record, the Commission advised the district court that it contested both the accuracy, validity and the sufficiency of the allegations in the complaint and statements in the affidavits respecting the irreparable injury that NOEL claimed would result. While the Commission did not expressly repeat its contention again when the district

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5/ Memorandum Decision, App. at A 8 to A 10.

court attempted to arrive at a stipulation of fact on the record,[6/] the position of the Commission was reaffirmed in letter submitted to the district court the next day prior to its ruling which stated:

> "We wish to again state that the Government does not accede to assertions of irreparable injury by plaintiffs in their pleadings and in the affidavits submitted in support of a Temporary Restraining Order. Should it become necessary to reach this issue, the Government reserves the right to cross examine the affiants and to submit evidence to the contrary." App. at A. 129.

A Notice of Appeal was filed by the Commission on November 12, 1975.

6/ That the statements on the record were not intended to be an exclusive and final stipulation of fact is clear from the fact that the district court expressly advised counsel that further stipulations might be required. App. at A-112.

ARGUMENT

I

THE DISTRICT COURT ERRED IN HOLDING THAT THE COMMISSION EXCEEDED ITS AUTHORITY IN SUGGESTING THE USE OF THREE DETECTION METHODS TO DISCOVER DEFECTS NOT APPARENT ON VISUAL EXAMINATION ALONE WITHOUT FIRST COMPLYING WITH THE STATUTORY REQUIREMENTS FOR THE PROMULGATION OF "CONSUMER PRODUCT SAFETY STANDARDS"

The sole basis for the district court's issuance of the preliminary injunction was its conclusion of law that the Commission could not describe defects in consumer products and suggest methods for their detection if anything more than references to mere visual observation was involved in the descriptions and suggested detection methods, unless the requirements for promulgating "consumer product safety standards" under Sections 7 and 9 of the Act, 15 U.S.C. §§2056 and 2058, were first satisfied.

The district court's construction is clearly inconsistent with the statute on its face and contrary to Congressional intent. Furthermore, the basis for its distinguishing between a suggested method for detecting the possible existence of defects in consumer products under Section 5 of the Act, and "consumer product safety standards" under Section 7 of the Act is unreasonable and ignores the statutory differences in purpose, quality, and effect between the two provisions.

A. The District Court Erred In Holding That The Commission Exceeded Its Authority Because The Commission Is Statutorily Authorized To Disseminate Information To The Public Concerning Defects Which Are Not Apparent By Visual Observation Alone

Under the Act Congress provided the Commission three basic ways to combat the great number of accidents, injuries and deaths that occur each year as a result of the use of consumer products.[7/] First the Commission is required to disseminate information to the public to inform them on how to avoid injury and accidents, including warnings of potential defects in consumer products; second, the Commission may establish "consumer product safety standards" for the future manufacture of such products which present an unreasonable risk of injury; and finally to take the necessary enforcement actions to protect the public against products already on the marketplace which present substantial or imminent hazards.

7/ During the Congressional debates on the bill, repeated references were made to the number of injuries and deaths that result. For example, Rep. Halpern stated as follows:

> "Mr. Chairman, the National Center for Health Statistics had estimated that each year 20 million Americans are injured in and around the home, and of this 110,000 injuries result in permanent disability and 30,000 in death. It is also estimated that the annual dollar cost to the economy of product-related injuries is over $5 billion. Particularly tragic is the fact that home accidents reap a death toll among children under 15 which is higher that that of cancer and heart disease combined."
> 118 Cong. Rec. H 8582 (1972).

The authority of the Commission to describe possible defects in consumer products and suggest methods for detecting their existence is clear from the face of Sections 2(a)(2) and 5(a)(1) of the Act. 15 U.S.C. §§2051(a)(2) and 2054(a)(1). Section 2(a)(2) states that one of the purposes of the Act is "to assist consumers in evaluating the comparative safety of consumer products." Section 5(a)(1) states that "The Commission shall*** disseminate*** information, relating to the causes and prevention of death, injury, and illness associated with consumer products***." This authority was granted to the Commission so that it could issue warnings about defects in products and advise how to avoid injury from these defects. As Congressman Moss made clear in the House debates: "***[The Bill] authorizes the dissemination of educational information to consumers to help them avoid accidents.***" 118 Cong. Rec. 8569. Obviously, in order for the Commission to assist the public in evaluating the comparative safety of consumer products and to warn the public of the causes of injuries and the ways to avoid them, the Commission must have the authority to publicly disclose what defects may exist and how the existence of the defects can be detected.

That this authority is not limited to only those defects that can be described and detected by mere visual

observation alone without any tactile or other sensory reference is also clear from the face of the statute. First the Act itself contains no such limitation. Second, the restrictions on dissemination of information that are imposed are clearly set forth in Section 6 of the Act, 15 U.S.C. §2055, none of which can be construed as creating such a limitation.[8/]

Moreover, the imposition of such a limitation on the Commission's authority under Section 5 of the Act would frustrate Congressional intent in authorizing the Commission to disseminate information to the public. Since most defects are not describable or detectable in terms of visual observation alone, the Commission would be precluded from being able to issue warnings on most products without first promulgating standards. The Commission could not, for example, suggest that a consumer bend the needles of a Christmas tree or to shake the tree for falling needles to detect if the tree

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8/ Appellees contended below that the Program in some manner violated Section 6(b), of the Act, 15 U.S.C. 2055(b). Section 6(b) places certain restrictions on the Commission prior to its disclosure of information. A mere glance at the provision indicates that it only applies to information disclosed "which will permit the public to ascertain readily the identity of ...[a] manufacturer or private labeler". No information being disseminated in the Program discloses the identity of any manufacturer or private labeler. The Program is directed towards all Christmas tree lights on the market without singling out any specific brand name, manufacturer or private labeler.

is too dry and thus a potential fire hazared without first establishing this detection method as a "product safety standard". Nor could the Commission recommend a simple squeeze test to determine whether the handle of a trouble light was too soft so as to expose the user to possible contact with a live electrical receptacle, a defect which a court has described as a "patent death trap."[9/]

Indeed many, if not most, of the Commission's informational publications contain advice on non-visual sensory perceptions and simple manipulations to disclose potential defects and to assist the consumer in determining comparative safety of products. Thus, for electrical products and aluminum wiring the Commission warns of a defect if the user detects an odor emanating from the product. Again with respect to aluminum wiring the Commission warns of a defect if a consumer touches a switch or receptacle outlet face plate and finds it warm. Finally, with respect to power saws the Commission explains a simple testing procedure for determining if a saw contains a safety braking device.

Under the reasoning expressed by the court below, few, if any, advisory statements, evaluations or warnings could be published. The Commission would be unable to act effectively

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9/ See paragraphs 8-10 of the Affidavit of Richard O. Simpson, Chairman of the Commission, sworn to November 13, 1975. App. at A-134 to A-136.

or expeditiously to publish information because of the insurmountable problems of time and resources that would be created as a result of having to first establish standards for each and every simple detection method. "Consumer product safety standards" under the Act are ordinarily to be promulgated after extensive research, testing and study, with the full participation of the public. The process is complex and lengthy, taking between 270 and 480 days or longer. In actual practice the process has taken longer. As the Chairman of the Commission stated in paragraph 6 of his affidavit:

> "***Under the statutory provisions the process is envisioned as ordinarily taking between 270 and 480 days or longer. In actual practice, the time period for the development and issuance of standards under the CPSA has proven to be unrealistically short. The Commission has to date commenced standard development proceedings for six products; swimming pool slides, architectural glass, power lawn mowers, book matches, television sets, and aluminum wire. In each standard development proceeding undertaken thus far, it has been necessary for the Commission to provide additional time for development of the standard and in those cases where a developed standard has been submitted to the Commission to extend the period within which it must propose a standard. Due to the complexity of the development process, including necessary staff analysis, review

> and modification of standards submitted to the Commission, and analysis and consideration of comments on proposed standard as a result of comments, the Commission has not yet issued any consumer product safety standards under CPSA." (App. at A-121).

In contrast under its authority to disseminate information, the Commission in two and a half years has published over a hundred brochures, booklets, "fact sheets" and other types of media communications to warn the public of the myriad dangers associated with consumer products. Many of these dangers are not visibly apparent but are readily disclosable by simple detection methods and do not represent qualitatively in either the level or scope of safety that required by a "consumer product safety standard".[10/] Under the district court's construction, the Commission should have first complied with the provisions of Sections 7 and 9 of the Act. This, of course, as a practical matter, would have resulted in few, if any, such warnings being published. As a result, the Commission's ability to help consumers evaluate the safety of various products and warn them of potential defects would be severely crippled. The Commission would be basically helpless to reduce the unacceptably high number of injuries and deaths that occur each year from the thousands upon

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10/ Simpson aff. paragraph 8, App. at A-135.

thousands of defective consumer products on the market. The years of Congressional effort to produce a comprehensive, effective and fair statutory remedy to the problem would thus be nullified.

Finally, the district court's construction is contrary to the general principle that statutes enacted to protect the public from injury are to be liberally construed. See, e.g., United States v. Diapulse Corp. of America, 457 F.2d 25, 28 (2d Cir. 1972). Here, the Court's construction is not only severely restrictive but has frustrated the intent of Congress that the Commission have broad powers to disseminate information to help reduce the great number of accidents, injuries and deaths caused by defective consumer products.

B. The Commission Is Not Required To Comply With The Provisions For Adopting "Consumer Product Safety Standards" Before Describing A Defect Or Suggesting A Method For Its Detection If The Defect Is Not Observable By Visual Observation Alone

In holding that the Commission had to first comply with the provisions for adopting "Consumer Product Safety Standards" in Sections 7 and 9 of the Act, 15 U.S.C. §§2056 and 2058, where the Commission wants to publicly disseminate information about a potential defect that is not detectable by visual observation alone, the district court has ignored the statutory differences in purpose, quality and effect between the two types of Commission actions.

A consumer product safety standard under Section 3(a)(2) of the Act, 15 U.S.C. §2052(a)(2), is defined as constituting either manufacturing and marketing requirements reasonably necessary to prevent or reduce an unreasonable risk of injury associated with such product under Section 7(a) of the Act or as a rule under Section 8 of the Act declaring a consumer product a banned hazardous product. A standard promulgated under Sections 7 and 9 of the Act and a ban under Section 8 are prospective in application only and cannot be applied to products already manufactured or on the market.

In contrast to the above, the issuance of a statement or warning under Section 5 of the Act is not intended to prevent consumer products with unreasonable risks of injury from being manufacturered or marketed. On the contrary, the purpose of such a statement is, inter alia, to help consumers evaluate the comparative safety of consumer products, to disclose the potential existence of defects that can cause injury and to advise the public how to avoid being injured. Unlike "consumer product safety standards", suggested methods of detecting potential defects in consumer products and other types of Section 5 statements do not have and are not intended to have the effect of law. Consumer products with the described defects may be manufacturered, marketed and used, unless prohibited for other reasons. In the instant case, retailers are advised that they are not legally required to examine their stock of Christmas tree lights, apply any, some or all of the suggested methods for detecting the defects, or otherwise participate and cooperate in the Program. Indeed, they are not required, nor even to be asked, not to sell any tree lights found to have one or more of the described defects. 11/

11/ See C.P.S.C. order 9010. 83, App. at A. 83, Paragraph 11(d). An earlier version of the Commissions order attached to the complaint and the lower court order, App. at A.17, Paragraph 11(d) contained a provision that the deputies should suggest to retailers that lights found to contain defects should be removed from the shelves. This provision was deleted at the request of counsel for appellees before the filing of the current lawsuit.

Furthermore, descriptions of defects and suggested methods of detection do not qualitatively constitute "consumer product safety standards" since they do not represent either the level or scope of safety required by a standard. Thus, for example, although the Commission is in the process of developing comprehensive, complex and highly technical consumer product safety standards for the manufacture and use of aluminum wiring to prevent and reduce the possibility of fires, the Commission under Section 5 has issued a simple statement to the public advising them to check for warm switches or receptacle outlet face plates, the smell of burning plaster, or for the flickering of lights.[12/] Indeed, the Commission, without challenge, has published "fact sheets" on every consumer product which is now the subject of a proceeding to establish a "consumer product safety standard."[13/]

It is axiomatic that the Commission, like other regulatory agencies, has the authority to take whatever action or actions, if any, it deems appropriate under the circumstances for the protection of the public interest:

12/ See Technical Fact Sheet No. 2.

13/ See Catalog of Publications, Pub. No./CPSC-75-620-9.

> "In a statutory scheme in which Congress has given an agency various bases of jurisdiction and various tools with which to protect the public interest, the agency is entitled to some leeway in choosing which jurisdictional base and which regulatory tools will be most effective in advancing the Congressional objective." Philadelphia Television Broadcasting Co. v. F.C.C., 359 F.2d 282, 284 (D.C. Cir. 1966).

That this allows the Commission to disseminate information to the public, before or during proceedings to establish consumer product safety standards or in connection with an adjudication, as it has in the case of certain mechanics trouble lights,[14/] cannot be gainsaid. In Bristol-Myers Co. v. F.T.C., 424 F.2d 935, 940 (D.C. 1970) and in F.T.C. v. Cinderella Career and Finishing Schools, 404 F.2d 1308, 1314-16 (D.C. Cir. 1968), the agency's right to publicize information in connection with a rule making proceeding and an adjudication, respectively, has been upheld. The mere fact that adverse consequences would result was held insufficient to enjoin publication for either statutory or constitutional reasons.

Similary, when Congress mandated the Commission to disseminate information to the public, to help them evaluate the comparative safety of products, to warn them of defects that cause injuries and advise them how to avoid and prevent such injuries from occurring, it must have foreseen that

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14/ See Paragraph 9-10 of the affidavit of Richard O. Simpson, App. at A-135-36, and Fact Sheet No. 60, App. at A-138.

adverse consequences [illegible]nents of an industry were likely to result. The mere fact, then, that adverse consequences do result is insufficient to either enjoin public dissemination of the information or to change the nature of the Commission's action to either rule-making or adjudication: 15/

> "***[T]he practical effect of the Commission's initial press release is undoubtedly deleterious to respondents' economic, business, and community status.***
>
> "***Unfortunate though this result may be, we are convinced that this damage does not constitute a transgression of the appellees' legal rights. In appraising a somewhat similar situation involving another government agency, we held that '[i]n the discharge by Congress of a dominant trust for the benefit of the public, the possibility of incidental loss to the individual, is sometimes unavoidable, American Sumatra Tobacco Corporation v. S.E.C., 71 App. D.C. 259, 262-63, 110 F.2d 117, 120-21 (1940)," F.T.C. v. Cinderella Career And Finishing Schools, Inc., supra, 404 F.2d 1316.

15/ Appellees have contended that the Commission's issuance of any warnings is subject to the provisions for rulemaking under the Administrative Procedure Act. Even if the definition of a "rule" under the A.P.A. could be read to include dissemination of such advisory information, it would clearly fall within the exception for interpretative rules and general statements of policy. 5 U.S.C. §553(b). See e.g., Public Service Comm'n of the State of New York v. F.P.C., 373 F.2d 816, 826-27 (D.C. Cir. 1967), rev'd in part on other grounds, 391 U.S. 9 (1968).

Indeed, here the affidavits submitted in support of NOEL's claims of injury show that the injury feared is neither direct nor legally recognizable because the retailers' fear of being subject to civil penalties under the Act derives from a complete misreading of the Act.[16/]

The Court should thus reverse the district court's ruling that the Commission exceeded its authority when it described potential defects and suggested methods for detecting defects not discernible by visual observation alone without first complying with the provisions for promulgating "consumer product safety standards" as contrary to the plain meaning of the statute and the manifest Congressional intent.

16/ See Argument II, infra.

II

THE ACTION SHOULD BE DISMISSED FOR LACK OF STANDING AND FOR WANT OF REVIEWABILITY

In addition to the patently reversible error committed by the lower court in construing Sections 5 and 7 of the Consumer Product Safety Act, this Court should order that the action be dismissed for either of two other reasons. First, the injury that NOEL has asserted is that retailers, as a result of the program, will return unsold their entire stock of Christmas tree lights out of fear of being subject to civil penalties under the Act. This alleged injury is not, however, sufficient to establish standing because it is neither direct nor legally cognizable. Second, NOEL, in essence is seeking judicial review of the Commission's decision to pursue one particular course of action rather than another, a matter which under the present circumstances is within the parameters of discretion granted the Commission by law. As such the Commission's decision to disseminate the information to the public is exempt from judicial review. 5 U.S.C. §701(a)(2).

A. The Action Should Be Dismissed For Lack Of Standing Because Appellees Have Not Asserted An Injury That Is Either Direct Or Legally Cognizable.

NOEL's claimed injury was that retailers, upon being contacted by a consumer deputy, would return their entire stock to the manufacturers and distributors without inspecting the lights for the described defects. No allegation was made that all, most or some of their products contained any of the defects that are the subject of the injunction. This claimed injury is insufficient to establish standing because it is neither direct nor legally cognizable.

Appellees' claim of injury to be sufficient to confer standing must be, inter alia, a " '***direct injury'***" sustained as a result of the Program, O'Shea v. Littleton, 414 U.S. 488, 494 (1974), and one that is "judicially cognizable." United States v. Richardson, 418 U.S. 166, 179 (1974). Here, it is neither.

The injury that NOEL has asserted and supported by affidavits from retailers is one that results - not from the Program - but from the retailers' ill-founded fear of liability to civil penalties and from the retailers' own decision to return the lights. No penalties are imposed on any retailer as a result of the Program, regardless of whether or not the materials provided are read or the lights are examined for the described defects. On the contrary, any penalties that exist under the Act for violations of its provisions are

applicable independently and separate from the Program. See, e.g., 15 U.S.C. §§2064(b)(2), 2068(a)(4) and 2069. A retailer's only responsibility under the Act in connection with Christmas tree lights would be to report to the Commission information obtained by it "which reasonably supports the conclusion that * * * [a] product * * * contains a defect which could create a substantial product hazard * * * unless * * * [such] retailer has actual knowledge that the Commission has been adequately informed of such defect ****". Section 15(b)(2), 15 U.S.C. §2064(b)(2). The retailer's liability to penalities under the Act has, if anything, been lessened since the information being disseminated by the Commission through the Program is convincing evidence that the Commission has been adequately informed of the defects in question.

Finally, the injury asserted by NOEL that retailers would merely return all of their lights and that the industry would suffer a loss of good will is purely speculative and even if true is not legally cognizable injury within the zone of statutorily protected interests. See generally, Association of Data Processing Service Organizations, Inc., v. Camp, 397 U.S. 150 (1970). In F.T.C. v. Cinderalla Career & Finishing Schools, Inc., 404 F.2d 1308, 1314-16 (D.C. Cir. 1968), the Court of Appeals reversed the order of the district court enjoining the issuance of a statutorily authorized press release notwithstanding the adverse consequences and damages that would be endured by the plaintiff-appellee as a result of the adverse publicity. The Court of Appeals held that the plaintiff-appellees' claim of damages did "not constitute a transgression of the appellees' legal rights," 404 F.2d 1316, for the reason that where an agency lawfully disseminates information, the consequent damages suffered by a party were not a legally recognizable injury:

> "*** We are confronted, then, not with the question of whether the appellees have suffered actual damages but whether the action of the Commission is so authorized or permitted in law as to place the appellees in the position of suffering damnum absque injuria." 404 F.2d at 313.

Accord, Bristol-Myers Co. v. F.T.C., 424 F.2d 935, 940, (D.C. Cir. 1970). Where no legal right has been violated, a person, though suffering adverse consequences, cannot be considered as having an injury that is sufficient to confer standing. Although this deficiency affects the merits of appellees' claim, it also impairs their standing since there is no legal right being invaded. NOEL has thus not asserted an injury within the zone of statutarily protected interests.

Since NOEL claimed injury is neither a direct result of the Program nor one that is legally recognizable, the action should be dismissed for lack of standing.

B. The Action Should Be Dismissed For Want of Reviewability

The Commission's decision to proceed under its authority to disseminate information, rather than to first promulgate "consumer product safety standards" or initiate adjudicatory enforcement proceedings is a decision wholly committed to the Commission's discretion and is thus not subject to judicial review.[17/] That Congress intended this is clear. The Commission's mandate is "drawn in such broad terms that in a given case there is no law to apply," Citizens to Preserve Overton Park v. Volpe 401 U.S. 402, 410 (1970), for determining whether the Commission should disseminate specific information or whether it has properly done so. Furthermore, traditionally courts have recognized the nonreviewability of an agency's otherwise valid choice of remedial actions, See, e.g., Mourning v. Family Publications Service, Inc., 411 U.S. 356, 371-72 (1973); NLRB v. Indiana & Michigan Elec. Co., 318 U.S. 9, 18 (1943). For a court to substitute its judgment for that of the Commission, the court would have to decide matters outside of its competence and expertise.

17/ The question of whether judicial review exists for abuse of discretion is not relevant to the present controversy since no allegation was made that can be considered as raising this issue.

See, e.g., Kletschka v. Driver, 411 F.2d 436 (2d Cir. 1969).

Should the Court decide that the Commission was not required to first adopt consumer product safety standards, the action should thus be dismissed for want of reviewability.

III

A PRELIMINARY INJUNCTION SHOULD NOT HAVE ISSUED WITHOUT FINDING THAT IRREPARABLE INJURY WAS CLEARLY SHOWN TO EXIST

The district court made no finding that NOEL would be irreparable injured. As shown above their claims of irreparable injury are deficient. Under the well established standard for the issuance of an injunction, irreparable injury or a balance of hardship in favor of appellees had to be clearly established. The standard is whether there has been "a clear shwoing of either (1) probable success on the merits and possible irreparable injury, or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidely toward the party requesting the preliminary relief." Gresham v. Chambers, 501 F.2d 687, (2d Cir. 1974). Where neither irreparable injury nor a balance of hardship, in favor of the applicant is clearly shown as likely to result from the action sought to be enjoined, a preliminary injunction should not issue even though likelihood of success on the merits is shown to exist. See e.g., International Controls Corp. v. Vesco, 490 F.2d 1334, 1347-48 (2d Cir. 1974); Saxe v. United States, 471 F.2d 1293; 1295-96 (2d Cir. 1972). The preliminary injunction should thus be vacated.

CONCLUSION

For the above reasons the Court should reverse the district court's determination that the Commission had exceeded its authority, dissolve the injunction and dismiss the action for lack of standing and want of reviewability.

Dated: Brooklyn, New York
November 28, 1975

Respectfully submitted,

DAVID G. TRAGER
United States Attorney
Eastern District of New York
Attorney for Defendants
225 Cadman Plaza East
Brooklyn, New York 11201

Of Counsel:

RICHARD P. CARO
Assistant U.S. Attorney

NORMAN BARNETT
Consumer Product Safety Comm'n

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS } ss
EASTERN DISTRICT OF NEW YORK

LYDIA FERNANDEZ being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 28th day of November 19 75 he served ~~a copy~~ two copies of the within

Brief for Appellants

by placing the same in a properly postpaid franked envelope addressed to:

Aberman, Greene & Locker, Esqs.
540 Madison Avenue
New York, N. Y.

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, ~~Washington Street~~ 225 Cadman Plaza East, Borough of Brooklyn, County of Kings, City of New York.

Lydia Fernandez
LYDIA FERNANDEZ

Sworn to before me this
28th day of November 19 75

Irene B. Cohen

IRENE B. COHEN
Notary Public, State of New York
No. 24-0[illegible]
Qualified in Kings County
Commission Expires March 30, 1977